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No. 73-600

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial with a co-defendant in the United States District Court for the Eastern District of Michigan, petitioner was convicted of 28 counts of mail fraud, in violation of 18 U.S.C. 1341.[1] Petitioner was committed to the custody of the Attorney General pursuant to 18 U.S.C. 4208(b). The court of appeals affirmed in a lengthy opinion (Pet. App. A). Petitioner here contends that a statistical report, derived from records stored on a computer tape, was improperly admitted into evidence; that he should not have been tried jointly with his co-defendant; and that he was denied a speedy trial.

[1]The co-defendant, who was convicted of 15 counts of mail fraud, did not appeal.

The facts are fully set forth in the opinion of the court of appeals (Pet. App. A, pp. 31-43). Petitioner and his co-defendant, a physician associated with him, were convicted of mail fraud committed pursuant to the following scheme: a Blue-Shield-insured patient at their clinic would be treated for an ailment not compensable by Blue Shield; the patient would be charged only a nominal fee, or none at all, but the consulting physician would then fill out a Doctor's Service Report (DSR), signed by the patient, claiming that he had performed a service which was compensable by Blue Shield; and the DSR would be submitted to Blue Shield, which would mail the doctor a check for the service which had never been performed.

To prove petitioner's guilt on each of the 28 counts, the government produced 12 former patients of petitioner and his co-defendant, who testified that they had gone to petitioner for treatment of colds, bronchitis, low blood pressure, and other non-compensable ailments. However, they identified their signatures on the DSR's submitted by petitioner to Blue Shield, which indicated that they had been administered treatment involving either the withdrawal of fluid from joints or the injection of medicine into joints (hereinafter joint treatments),[2] which are compensable surgical procedures.

Dr. Richard Thompson testified that, although he and his associate had an active practice with an informal specialty in skeletal conditions, they would normally perform only about 1,000 joint treatments in a year

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[2]The term "joint treatments" is used for convenience to refer to the five treatments at issue in this case—initial arthrocentesis, subsequent arthrocentesis, initial aspiration of bursa, subsequent aspiration of bursa, and aspiration of hematoma (Pet. App. A, p. 41).

(T. 842).[3] However, Blue Shield records indicated that in 1967 petitioner and his co-defendant had been paid for over 24,000 joint treatments (Pet. App. A, p. 41). Dr. Thompson also testified that, in his expert opinion, it would have been impossible for a joint to accumulate fluid so rapidly as to necessitate the frequency of treatment that was claimed by the two doctors for one of the patient-witnesses (T. 790-791).

In corroboration, the government introduced a portion of Blue Shield's statistical report showing the number of payments made by Blue Shield of Michigan for joint treatments. Petitioner and his co-defendant accounted for more than 35 percent of all claims paid by Michigan Blue Shield for such treatments in that year.

Both petitioner and his co-defendant testified that they had never discussed defrauding Blue Shield. They stated that every DSR submitted correctly reflected the services they had performed. The defense produced 101 witnesses who testified that the treatment they received was correctly reported on the DSR.

1. Petitioner's principal contention (Pet. 7-23) is that Blue Shield's 1967 statistical report was improperly admitted. He claims that a proper foundation was not established, that the evidence was used to suggest an unwarranted inference of guilt, and that he was not given an opportunity effectively to challenge the admissibility and reliability of the report and the records upon which it was based. These claims were properly rejected by the court of appeals in an opinion on which we primarily rely (Pet. App. A, pp. 47-55).

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[3] "T." refers to the trial transcript.

a. A proper foundation was established for admission of the report. The annual statistical report consists of a list of the number of claims paid by Blue Shield in a given year, by claim category. It was introduced by two witnesses, Charles Smith, director of the Blue Shield Service Review Department, whose job is to insure the integrity of the reporting forms (T. 133, 152-153, 189-192), and Francis Mrachina, who supervises computer systems and programs for Blue Shield (T. 1096). They testified that the record is prepared in the ordinary course of business (T. 1017) and used by Blue Shield in a statistical analysis of payments made each year (T. 1101). The report is prepared as follows: doctors make payment claims on a DSR which shows, *inter alia,* the name of the doctor and patient and the date and nature of the service performed (T. 140-142); the DSR's are sent to claims examiners who adjudicate the claim, review the DSR for completeness, and enter the amount to be paid (T. 148); the appropriate information is then taken from the DSR and placed on magnetic tape in a computer (T. 149); from the tape, the computer issues bi-weekly checks, which are mailed to the doctors (T. 150-151); the information about claims which have been paid is transferred to the paid-claims file in the computer (T. 1017); and, finally, the information in the paid-claims file is printed out in the form of the annual statistical report (T. 1256).

b. The report, once admitted, was properly used. The jury was not confronted with a complicated statistical assessment of probability, only the bare fact that petitioner and his co-defendant accounted for more than 35 percent of all the claims paid for joint treatments by Blue Shield in Michigan. Joint treatments are

relatively common, and they are simple and inexpensive to administer. Moreover, since they are painful (T. 1427) and involve sticking a large needle, perhaps three and one-half to six inches long (T. 780), into a body joint and leaving it there for three to ten minutes (T. 779) while fluid is extracted or medication injected, it is highly unlikely that many patients would submit to unnecessary treatments. The jury was only asked to consider whether, in light of these facts and the direct testimony of patients, petitioner and his co-defendant had, in fact, falsely claimed compensation for services not performed.

In contending that the government's use of the report was improper, petitioner relies upon cases involving the use of mathematical probabilities in lieu of evidence (see Pet. 11-12). There is no conflict between those cases and the decision below. There was ample evidence here of the fraudulent transactions even without the report, which was introduced only for corroboration. In addition, no mathematical probabilities were introduced at all. The jury was presented with facts, not probabilities, and there is no reason to think that the jury was misled or confused.

c. The introduction of the report did not cause unfair surprise, and petitioner had an adequate opportunity to challenge its admissibility. On April 27, 1971, more than four months prior to trial, petitioner's counsel was forwarded a copy of the report that was introduced at trial (Pet. App. A, p. 51; T. 296); he was not informed that the records were kept on computer tapes only because the government was not aware of the fact at that time. However, this could not have prejudiced petitioner, since the method of testing the admissibility and reliability of business records is basically

the same whether the records are stored on magnetic tape or on paper. Petitioner made no effort, pursuant to Rule 16(b), Fed. R. Crim. P., to discover the nature and basis of this summary.

2. Petitioner further contends (Pet. 23-26) that the district court improperly permitted him to be tried jointly with his co-defendant. This contention was fully considered and properly rejected by the court of appeals, in an opinion (Pet. App. A, pp. 43-46) upon which we rely.

3. Petitioner also claims (Pet. 27-29) that he was denied his right to a speedy trial when trial commenced 688 days after indictment. At no time did petitioner demand his right to a speedy trial; he did not even raise this issue with the district court, but advanced it for the first time on appeal. The case was a complex one, which ultimately took eight weeks, involving almost 130 witnesses, and more than one hundred exhibits. The government did not request any delays in listing the case for trial; the only continuance was requested by the defense, causing the pre-trial conference to be adjourned for one month. Moreover, petitioner makes only generalized claims of prejudice; he points to no specific prejudice resulting from the delay. Applying the considerations articulated by this Court in *Barker* v. *Wingo*, 407 U.S. 514, it is clear that petitioner's right to a speedy trial was not denied.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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